Scheduled for Oral Argument on _____

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

18-1165, 18-1171

18-1165

MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

18-1171

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

MICHAEL CETTA, INC., d/b/a SPARKS RESTAURANT,

Respondent.

ON PETITION FOR REVIEW FROM THE NATIONAL LABOR RELATIONS BOARD

CORRECTED BRIEF FOR PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Petitioner Michael Cetta, Inc. d/b/a Sparks Restaurant ("Sparks") provides the following information pursuant to Circuit Rules 26.1 and 28(a)(1).

I. PARTIES

The following is a list of all parties who have appeared before the National Labor Relations Board ("Board"), the agency below, or before this Court: Sparks, the United Food and Commercial Workers Local 342 (the "Union"), and the General Counsel for the National Labor Relations Board (the "General Counsel" or "GC").

II. RULINGS UNDER REVIEW

The ruling under review in this case is the Decision and Order issued by the Board on May 24, 2018, in Case Nos. 02-CA-142636 and 02-CA-144852, which is reported at *Michael Cetta, Inc. d/b/a Sparks Restaurant*, 366 NLRB No. 97.

III. RELATED CASES

The ruling under review has not previously been before this Court or any other court. There are no known related cases.

CORPORATE DISCLOSURE STATEMENT

Sparks hereby certifies that it does not have a corporate parent and no publicly-held corporation owns ten percent or more of the stock of Sparks.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Sparks requests oral argument.

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GLOSSARY OF ABBREVIATIONS

TERM	REFERENCE
A__	Appendix at page __
ALJ	Administrative Law Judge
Tr. __	Transcript of Proceedings before the ALJ at page __ (excerpts included at A117-200)
Sparks	Petitioner Michael Cetta, Inc. d/b/a Sparks Restaurant
R #	Sparks Exhibit #
GC	General Counsel for the National Labor Relations Board
GC #	General Counsel Exhibit #
NLRA	National Labor Relations Act
Board	National Labor Relations Board
Union	United Food and Commercial Workers Local 342

JURISDICTIONAL STATEMENT

The Board had jurisdiction under NLRA §10(a), 29 U.S.C. § 160(a). The Board issued its Decision and Order on May 24, 2018 (the "Decision"). Sparks filed its Petition for Review on June 13, 2018 (Docket No. 18-1165). The Board filed its Cross-Application for Enforcement on June 26, 2018 (Docket No. 18-1171). The cases were consolidated on June 28, 2018. This Court has jurisdiction pursuant to NLRA §§ 10(e) and (f), 29 U.S.C. §§ 160(e) and (f).

STATEMENT OF THE ISSUES

1. Whether the Board erred in finding Sparks had discharged striking employees who, by their own admission, were "locked out"?

2. Whether the Board erred or acted arbitrarily and capriciously in finding Sparks had discharged striking employees, even though the GC failed to meet its burden of proof and prove discharge, and where such a finding is not supported by substantial evidence?

3. Whether the GC was estopped from arguing for the first time in its post-hearing brief that Sparks had not hired permanent replacements?

4. Whether the Board denied Sparks its Due Process rights by considering and making findings as to issues not raised in the Complaint and which Sparks did not have a meaningful opportunity to litigate?

5. Whether the Board committed prejudicial error by denying Sparks' Motion to Reopen the Record?

6. Whether the Board erred or abused its discretion by finding, despite substantial evidence in the Record to the contrary, Sparks did not prove it had hired permanent replacements or created and maintained a preferential hiring list, and did not have a legitimate and substantial reason to reduce its waitstaff?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum, infra at 53.

STATEMENT OF THE CASE

I. Background

Sparks is multigenerational, family-owned restaurant located at 210 East 46th Street in New York, New York. Sparks employs Maitre D's, waiters, bartenders, chefs, food preparers and dishwashers. (Tr. 246:20–248:18).

In or around July 2013, the Union was certified as the bargaining representative of all Sparks' regular full-time waitstaff and bartenders. (Tr. 174:25–175:1 (A137)). In September 2013, Sparks commenced bargaining with the Union for an initial collective bargaining agreement. Bargaining continued until December 5, 2015, during which Sparks and the Union had numerous negotiating sessions. (Tr. 175:2-18 (A138)).

Unionized employees commenced two strikes to force an end to negotiations and compel Sparks to enter into a collective bargaining agreement. The first, on December 5, 2014, lasted approximately two hours. Thirty-four waiters and two bartenders left the restaurant at approximately 7:30 p.m., the height of the dinner rush during the start of the busy holiday season. (Tr. 34:12-22; 101:5-11). The striking employees remained on the picket line until approximately 9:00 p.m., when they made an unconditional offer to return to work that was accepted without hesitation by Sparks. (Tr. 34:12–35:3; 101:8-18).

A second economic strike started on December 10, 2014, again during the busy dinner shift (the "Strike"). (Tr. 35:4-10; 102:13-19). Sparks used non-striking employees and management to cover for the striking employees. Strikers maintained an active strike and picket line outside the restaurant throughout the holidays and well into January 2015, while negotiations continued between Sparks and the Union. (Tr. 384:13–384:15; *see generally* R 5 at A428-432).

In October 2014, Sparks hired temporary seasonal waiters to work during the holiday season. (Tr. 409:13-21; 412:12-14). At the time of the first strike, Sparks had a "roster" of forty-five total waiters and bartenders consisting of thirty-seven full-time waiters, three regular full-time bartenders and five seasonal employees. Not every employee on the roster was scheduled to work every day. (Tr. 291:20-21; 437:8-11; 438:11-18; GC-13A at A237). On average, Sparks scheduled only thirty-

seven waiters to work each day during the busy season, as demonstrated by Sparks' daily tip records. (Tr. 293:8-17 (A151); 294:8-13 (A152)).

After the striking employees walked off their jobs for the December 10, 2014 Strike and did not immediately return, Sparks was unsure whether they would return. Accordingly, Sparks hired permanent replacements for the striking employees, who began working as early as December 11, 2014. (R 7A-HH at A437-470; A103-116). Sparks issued offer letters to the permanent replacements, all but one of which were returned signed within a day or so. (R 7 at A437-470; Tr. 426:18-19 (A186)). Shortly thereafter, Sparks created and then maintained a preferential hiring list so as to fulfill its *Laidlaw* obligations and recall the striking employees in order of seniority as/when/if positions became available.

On Friday night, December 19, 2014, at 8:55 p.m., Lisa O'Leary, the Union's Secretary-Treasurer, sent an email to Sparks' counsel, Marc Zimmerman, in which she made an unconditional offer of return to work on behalf of the striking employees (the "Unconditional Offer"). (GC-9 at A232-233). That email was the first unconditional offer of return to work made since the start of the Strike.[1] After

[1] The Union contends representatives tried to make an in-person unconditional offer of return to work directly to Sparks management on December 19, 2014 between 3:30 p.m. and 4:30 p.m. but were stopped at the entrance by a security guard. (Tr. 157:2 (A132)–158:24 (A133)). Notably, Ms. O'Leary's email makes no reference to this alleged attempt; instead, it references an offer (which Sparks deemed conditional) sent by Local 342 president Rich Abondolo via e-mail. (GC-9 at A233).

discussing the email with Sparks' owner, Mr. Zimmerman responded on December 22, 2014 (the "Zimmerman Response"), stating Sparks "must reject the union's offer to return the striking employees to work at this time." (GC-9 at A231). Given the misconduct that already had occurred on the picket line during the preceding ten days, and in reliance on *Avery Heights*, 448 F.3d 189 (2d Cir. 2006), Sparks decided not to mention in the Zimmerman Response it had hired permanent replacements. Neither Mr. Zimmerman nor Sparks ever stated – or even implied – the striking employees were discharged, including in the Zimmerman Response.

In her December 22, 2014 reply to Mr. Zimmerman (the "O'Leary Reply"), Ms. O'Leary never stated the Union considered the striking employees discharged by the Zimmerman Response. To the contrary, she volunteered, "our [i.e., the Union's] position is that Sparks employees are locked out." (GC-9 at A231).

In the Charge filed by the Union with the NLRB on January 22, 2015 (the "Lock Out Charge"), the Union reiterated its position the striking employees were locked out – not discharged – since "on or about December 19, 2014," and alleged Sparks thereafter continued to "lock out for discriminatory purposes all of those employees" who participated in the Strike. (A32).

Furthermore, following the Zimmerman Response, Sparks and the Union had at least three additional bargaining sessions; January 8, 2015, January 20, 2015, and February 25, 2015. During at least two of these bargaining sessions, Sparks advised

the Union the striking employees remained active employees and discussed returning them to work. (Tr. 658:4-7 (A198); 659:17-20 (A199); 660:6-14 (A200)).

In August 2015, following the departure of a permanent replacement, Sparks recalled the most senior striking employee, Adnan Nuredini, from the preferential hiring list. (GC-4 at A209; GC-6 at A213). Mr. Nuredini did not respond to Sparks' recall letter; accordingly, Sparks made a reinstatement offer to the next-senior striking employee, Ante Ivce, who accepted the offer and returned to work. (Tr. 256:9–257:14; GC-11 at A235; GC-12 at A236). It is undisputed Sparks followed the *Laidlaw* protocol until all striking employees had been offered reinstatement.

II. The Charges, the Complaint, and the Amended Complaint

On January 22, 2015, the Union filed the Lock Out Charge with the NLRB, alleging Sparks violated NLRA §§ 8(a)(1) and (3) because, *inter alia*, "on or about December 19, 2014 … the employer … locked out all of those employees that were engaged in" the Strike, and "to date the employer … has continued to illegally lock out for discriminatory purposes all of those employees who engaged in" the Strike. (A31-32). Nothing in the Lock Out Charge – filed a whole month after the Zimmerman Response – alleges Sparks ever discharged any, let alone all, of the striking employees. Ibid.[2]

[2]The Union filed three other Charges. One, filed on or about December 4, 2014, alleged Sparks refused to bargain in good faith; it was withdrawn. (A21). The second one, filed December 10, 2014, and amended January 9, 2015 (the

The Regional Director of Region 2 issued an Order Consolidating Cases, a Consolidated Complaint, and a Notice of Hearing on or about May 25, 2015, a full four months after the Union filed the last of its Charges against Sparks. (A35). The Order consolidated the Solicitation Charge and the Lock Out Charge, and the Complaint "is based on these charges:"

> 1. On or about December 6, 2014, Respondent, by Valter Kaporic, in the Madison Room, solicited employees to withdraw their support from the Union.
>
> . . .
>
> 7. a. On or about December 19, 2014, all the striking employees, described above in paragraph 6, by the Union, verbally and in writing, made an unconditional offer to return to their former or substantially equivalent positions of employment.
>
> b. Since on or about December 19, 2014, Respondent has failed and refused to reinstate any of the striking employees described above in paragraph 6 to their former or substantially equivalent positions of employment.
>
> c. Since on or about December 19, 2014, Respondent has denied the striking employees, described above in paragraph 6, their right to be placed on a preferential hiring list.

"Solicitation Charge"), alleged Sparks committed "solicitation" after the First Strike. (A27; A29). The third, filed January 29, 2015, alleged Sparks failed to provide certain information requested by the Union for purposes of collective bargaining; it was withdrawn. (A33). Notably, as with the Lock Out Charge, none of these other Charges alleged Sparks ever discharged any of the striking employees.

(A35-38). Although the Complaint, by its express language, is based solely on the Solicitation Charge and the Lock Out Charge, in paragraph 7.d. it nonetheless asserts a separate allegation appearing in neither of those (or any of the other) Charges – Sparks discharged the striking employees on December 22, 2014:

> d. On about December 22, 2014, Respondent by its counsel, by email to the Union, discharged the 36 striking employees described above in paragraph 6.

(A38).

The Notice of Hearing scheduled the hearing for July 14, 2015. (A40). The hearing, however, was adjourned twice; first to July 27, 2015, and then to October 5, 2015. The General Counsel opposed a request to adjourn the hearing a third time, and it was denied. (A49-52).

Less than three weeks before the hearing – and some nine months after the Union filed the Lock Out Charge – on or about September 18, 2015, the Regional Director issued an Order Amending Complaint and Amendment to Complaint. (A47). The amendment did not add any new factual allegations, did not assert new violations, and did not advance any new theories of liability. Rather, the only change to the Complaint effectuated by the amendment was to expand the remedy.

> The following paragraph is inserted in the Remedy section, after the first paragraph:
>
> As part of the remedy for the unfair labor practices alleged in paragraph 7 of the Complaint, the General Counsel seeks an order requiring that Respondent offer reinstatement to all 36 discharged

> strikers, and that Respondent make whole all 36 discharged strikers from the date of their discharge – December 22, 2014 – with interest, ***despite the fact that Respondent had hired permanent replacement workers before the date of discharge***.

Ibid (emphasis added). As conceded by the GC, "nothing about the General Counsel's substantive allegations with respect to Respondent's liability, as outlined in the May 29[, 2015] Complaint, has changed." (A50).

III. The Hearing and ALJ's Decision

The hearing held before Administrative Law Judge Lauren Esposito ("ALJ") commenced October 7, 2015. There were six hearing days, during and between which the GC and Sparks, through counsel, reviewed documents produced by Sparks in response to a subpoena. (A53). The hearing closed October 16, 2015. The ALJ left open the record in case additional documents were identified by the GC or Sparks prior to the submission of post-hearing briefs. (Tr. 568:1-5, 8-9 (A196)).

During the hearing, the GC made no effort to amend further the Amended Complaint. To the contrary, the GC confirmed the Amended Complaint raised only two issues: first, whether Sparks failed to fulfill its *Laidlaw* obligations by failing to recall the striking employees when vacancies occurred; and, second, whether the Zimmerman Response effected a discharge. (Tr. at 15:25–16:3 (A120); 20:16–25 (A125); 355:24-25 (A158); 362:14-20 (A161); 363:8-10; 363:6-10 (A162)). After the GC rested its case, Sparks confirmed its understanding that those two issues – and only those two issues – were before the ALJ. (Tr. at 350:6-13 (A153)). The ALJ

already acknowledged she had the same understanding. (Tr. at 22:5-10 (A126); 111:11-12 (A130); 145:11-13 (A131)). The GC likewise made no effort to amend the Complaint after the hearing closed, or prior to the submission of post-hearing briefs.

In response to the *Laidlaw* compliance issue, Sparks asserted an affirmative defense based on legitimate and substantial business reasons, including a precipitous decline in business starting in January 2015 (A44), a fact conceded by the GC's very first witness, Valjon Hajdini. (Tr. at 69:20-22 (A128) ("there was a marked decline" from December 2014 to January 2015)). To counter this defense, the GC selected from the comprehensive documentary evidence produced by Sparks in response to the GC's subpoena "Weekly Tip records" and "Employee Hours summaries" for only one "random" week per month for the period 2010 through 2015. (Tr. at 303:16-25; *see also* GC-13B at A238; GC-23B at A418). Rather than introduce a GC-prepared summary of the information in the documents for those "random" weeks, the GC and Sparks agreed the GC would introduce the underlying documents, and Sparks would introduce "Daily Tip sheets" for those same weeks. (Tr. at 565:21–566:6 (A194-A195)).

Notwithstanding the limitation of the hearing to the two issues expressly set forth in the Amended Complaint, in its post-hearing brief the GC raised for the first time a new issue: whether Sparks even hired permanent replacements to replace the

striking employees prior to the Union's Unconditional Offer. In support of this new issue, the GC asserted Sparks had not introduced documentary evidence, specifically Weekly or Daily Tip sheets, for the period December 15 through December 21, 2014, and then asked the ALJ to draw an adverse inference from the fact Sparks had not done so, specifically, those records would have shown the re-assigned kitchen staff and new hires were not working prior to the making of the Unconditional Offer.

The ALJ issued her decision on November 18, 2016. In it, the ALJ considered the new issue on the merits – even though it never was litigated during the hearing – and held Sparks had not met its burden of proof to show it hired permanent replacements prior the making of the Unconditional Offer. (A11). The ALJ did so after she drew the adverse inference urged upon her by the GC. (A10-11).

Notwithstanding this holding, and although the ALJ correctly notes *Laidlaw* rights are triggered as/when/if permanent replacements are hired prior to an unconditional offer of return to work (A13), the ALJ inexplicably next addressed and held Sparks did not comply with its *Laidlaw* obligations, either to prepare and maintain a preferential hiring list or to fill vacancies. (A13-14).

Finally, the ALJ held Sparks discharged all the striking employees on December 22, 2014, by and through the Zimmerman Response. (A14). Although the Amended Complaint alleges the Zimmerman Response alone effectuated the discharge (A38), the ALJ relied not only on the Zimmerman Response, but also on

events that occurred weeks and months after December 22, 2014, to establish a December 22, 2014 discharge. (A14-16).

Having made these holdings, the ALJ found Sparks violated NLRA§§ 8(a)(1) and (3) by: 1) failing and refusing to reinstate the striking employees despite an unconditional offer to return to work; 2) denying the striking employees the right to be placed on a preferential hiring list; and 3) discharging them. The ALJ ordered a make-whole remedy of immediate reinstatement and backpay from the date of the alleged discharge, December 22, 2014. (A18-19).

IV. Proceedings Before the Board, and the Board's Decision and Order

Sparks timely filed Exceptions to the ALJ's Decision, and in doing so requested oral argument.[3] Sparks also filed a Motion to Reopen the Record for the limited purpose of including in the Record certain documentary evidence Sparks produced to the GC ***prior to the hearing*** in response to the Subpoena (A99-116) (notwithstanding the mistaken statements by the ALJ to the contrary (A11); specifically, the Weekly and Daily Tip sheets for the period December 15 through December 21, 2014 that, as the ALJ anticipated, proved Sparks hired permanent replacements who started working before the Union made the Unconditional Offer.

[3] The GC timely filed a limited Cross-Exception. In a footnote, the Board stated, "In view of our finding that the Respondent failed to establish it had permanently replaced the striking employees, we find it unnecessary to pass on this exception because it would not affect the remedy." (A1, n.4).

On May 24, 2018, the Board issued its Decision and Order. (A1). The Board denied Spark's request for oral argument (*id.* n.2), denied Sparks' Motion to Reopen the Record (*id*. n.3), and, in a single sentence, stated summarily it "has decided to affirm the [ALJ's] rulings, findings, and conclusions …." *Id* (footnotes omitted).

In a footnote, however, the Board explained it was not affirming all the rulings, conclusions and findings. In particular, the Board stated, "[i]n adopting the [ALJ's] conclusion that [Sparks] violated Sec. 8(a)(3) and (1) by failing and refusing to reinstate and by discharging the striking employees, we find it unnecessary to pass on whether [Sparks] also violated [them] by denying employees their right to be placed on a preferential hiring list." (*Id*. n.3). The balance of the footnote suggests the Board split 2-1 on this issue, as it explains Member Emanuel "finds [Sparks] failed to carry its burden to prove, as an affirmative defense, that it hired permanent replacements before the unconditional offer to return," and therefore "finds it unnecessary to pass on whether Sparks violated Sec. 8(a)(3) and (1) by discharging the striking employees …." Ibid.[4]

[4] "Member Emanuel observes that [Sparks'] letters to replacements offering them employment would have been adequate to establish a mutual understanding if [Sparks] had provided specific evidence of when the letters were signed by the replacements and returned." (A1, fn. 3).

SUMMARY OF ARGUMENT

Striking employees who are locked out are, as a matter of law, active employees and, therefore, have not been discharged. The Union conceded the striking employees were locked out and did not claim in any of the four Charges that Sparks had discharged the striking employees. The GC presented no witnesses who testified, or evidence that demonstrated, the striking employees had been discharged. Nonetheless, the Board ignored its own precedent, and improperly found Sparks had discharged the striking employees in violation of Section 8(a)(3) and (1).

Even if the striking employees, through the Union, had not conceded they were locked out (which they did), the Zimmerman Response still did not effect a discharge. Sparks expressly declined "at this time" the Union's unconditional offer of return to work. The phrase "at this time" is temporal; it necessarily means Sparks may, at another time, change its position and accept the Union's unconditional offer of return to work. That is not consistent with the definitive act of discharge.

Furthermore, when an employer relies upon Board precedent (*Avery Heights*) and legitimately withholds from striking employees the fact it hired permanent replacements, that same act cannot "create ambiguity" in the minds of striking employees about whether they have been discharged. Plainly, the Board cannot impose such an affirmative obligation to inform the striking employees they were

permanently replaced in the face of established precedent permitting Sparks to withhold that very information.

Even assuming *arguendo* the contents of Sparks' communication rejecting the Unconditional Offer in such a way as to create ambiguity in the minds of the striking employees about whether they have been discharged, unless that communication actually was received by or shared with those employees, those employees have no basis in fact to think they have been discharged. Here, the Zimmerman Response was sent only to the Union secretary/treasurer, Lisa O'Leary. Ms. O'Leary testified she shared it with none of the striking employees, and affirmatively conceded the Union's position was the striking employees were locked out; neither she nor the Union accused Sparks of having discharged them. Consequently, it is a factual impossibility to find the Zimmerman Response created ambiguity in the minds of striking employees about whether they had been discharged.

The Board conceded in its Complaint and Amended Complaint that Sparks had hired permanent replacements. It did so in the Complaint by accusing Sparks of having denied the striking employees their right to be placed on a preferential hiring list, a right that comes into being ***only*** as/when/if an employer has hired permanent replacements to fill the positions of the striking employees. It did so again in the Amended Complaint by seeking a make whole remedy "despite ***the fact that Respondent had hired permanent replacement workers*** before the date of

discharge" (emphasis added). Throughout the hearing, the GC repeatedly conceded the hiring of the permanent replacements was not at issue. In fact, as stated by the GC twice during her opening statement, the issue before the ALJ was not whether it had hired permanents replacements, but whether it had hired ***enough*** permanent replacements to fill it needs for waitstaff. Given those concessions, Sparks neither prepared nor presented its case to demonstrate it had hired permanent replacements.

The GC, therefore, was estopped from arguing in its post-hearing brief that Sparks did not hire permanent replacements. Alternatively, the Board denied Sparks its Due Process rights by affirming the ALJ's consideration of and decision on the merits of an issue that was not raised in the Complaint and that Sparks did not have a meaningful opportunity to litigate.

The Board also committed prejudicial error by denying Sparks' motion to reopen the Record to include Weekly Tip records and Daily Tip sheets for the period December 15 through December 21, 2014, the very documents the ALJ deemed highly probative of whether Sparks had hired permanent replacements. Contrary to the statement made three times by the ALJ in her Decision, Sparks ***did*** produce these documents in response to the Subpoena. Nonetheless, the GC improperly sought, and the ALJ improvidently drew, an adverse inference from the misrepresentation Sparks had withheld the documents.

Regardless, substantial evidence in the Record demonstrates Sparks had hired permanent replacements. That evidence includes uncontroverted testimony of Susan Edelstein, Sparks' human resources consultant, and 34 signed offer letters from permanent replacement employees. That evidence demonstrates it is highly likely at least 28 of the 34 offer letters were signed and returned prior to the Union's Unconditional Offer. In finding otherwise, the Board contravened established law that holds "mutual understanding" of permanent replacement status may be satisfied through unilateral statements by the employer, even if the permanent replacement starts work after the striking employees make an unconditional offer of return to work. The Board, therefore, committed error and/or acted arbitrarily and capriciously in finding Sparks did not prove it hired permanent replacements.

Substantial evidence in the Record likewise demonstrates Sparks complied with its obligations under *Laidlaw* by creating, maintaining and using a preferential hiring list to recall and reinstate the striking employees. Indeed, in executing a Section 10(j) Stipulation with Sparks, the Board acknowledged the existence of the preferential hiring list when it imposed upon Sparks an affirmative duty to "***[c]ontinue*** to maintain its preferential recall and reinstatement list," and use it to recall striking employees. Sparks can "continue" to do only that which already had been, and is being, done.

Finally, Sparks had a legitimate and substantial business reason to reduce its waitstaff in 2015: a meaningful decline in business. That decline is demonstrated by evidence in the Record, including sales reports from 2015 and prior years. The ALJ and the Board ignored what, in the restaurant business, may be the most meaningful data set: tips per waiter. That data demonstrates tips per waiter either stayed neutral or fell despite the reduction in waitstaff. In other words, had Sparks in 2015 maintained a waitstaff the size of its 2014 complement, the tips per waiter would have plummeted. This decline in business justified Sparks in reducing its complement of waitstaff.

STANDING

Sparks has standing under NLRA §10(f), 29 U.S.C. § 160(f).

ARGUMENT

I. Standard of Review

Pursuant to the Administrative Procedures Act, a reviewing court must set aside agency action, findings and conclusions that are arbitrary and capricious, an abuse of discretion, or not otherwise in accordance with the law. 5 U.S.C. § 706(2)(A). The Court must review the whole record before the Board and can overturn a decision "if the Board's factual findings are not supported by substantial evidence or the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 638

(D.C. Cir. 2017); 29 U.S.C. § 160(e). Furthermore, the court reviews questions of law *de novo*. *Dresser-Rand Co. v. NLRB*, 838 F.3d 512, 516 (5th Cir. 2016) (*citing Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007).

In reviewing an ALJ's decision, the Board has an obligation to engage in "reasoned decision making." *Fred Meyer Stores*, 856 F.3d at 638 (citing *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). Although circuit courts usually accord great deference to the Board's findings of fact, a circuit court is not bound to abide by the Board's inferences to the extent they are irrational, tenuous or unwarranted. *New England Healthy Care Employees Union v. NLRB (Avery Heights)*, 448 F.3d 189, 194 (2d Cir. 2006). The Board is "not free to prescribe what inferences from the evidence it will accept and reject but must draw all those inferences that the evidence fairly demands." *Id.* at 378. If the Board's irrational inference is sufficiently central to the Board's conclusion, the drawing of the inference may be arbitrary and capricious. *Bowman v. Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974).

A reviewing court's scope of review is generally limited, but only if the Board decision is supported by substantial evidence. *NLRB v. Baptist Hosp.*, 442 U.S. 773 (1979). "An agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Bowman*, 419 U.S. at 284. While the Board may relegate its

reasoning to footnotes, it still must explain its rationale. *See NLRB v. CNN America, Inc.*, 865 F.3d 740, 749-50 (D.C. Cir. 2017) (setting aside a Board's decision where two sentences in a footnote were inadequate to explain departure from precedent); *NLRB v. Gimrock Const., Inc.*, 247 F.3d 1307, 1312 (11th Cir. 2001) (rejecting the Board's finding where it "buried a crucial determination in a footnote, but, more importantly, it did not cite any evidence or give more than a skeletal explanation for its determination").

The Court has remanded where the Board's decision "evidences a complete failure to reasonably reflect upon the information contained in the record …." *Fred Meyer Stores*, 865 F.3d at 638; *see also Skyline Distributors v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996) (examining the record and reversing in relevant part because the Board's opinion was "so lacking in evidentiary support and reasoned decision-making that it seems whimsical"); *Good Samaritan Medical Center v. NLRB*, 858 F.3d 617, 637-38 (1st Cir. 2017) (finding that the court could not determine whether the NLRB's decision was based on the record as a whole in the absence of any discussion of the contradictory evidence present in the record).

II. The Board's Conclusion that Sparks Discharged the Striking Employees Ignores Both Substantial Evidence and Established Law

The Board adopted the ALJ's finding that Sparks discharged the striking employees. (A1, n.3). The ALJ found "Zimmerman's December 22 email on behalf

of Sparks to O'Leary [i.e., the Zimmerman Response] constituted a discharge of the striking employees." (A14).

In making that finding, however, neither the ALJ nor the Board ever considered the O'Leary Reply, or other contemporaneous and subsequent statements by the Union, as to whether the striking employees were discharged. That omission is inexplicable, especially given the ALJ quoted the O'Leary Reply in full. It also is fatal to the Board's position.

On December 22, 2014, at 11:14 a.m. – approximately forty-five minutes after receiving the Zimmerman Response, and in reply to it – Ms. O'Leary sent an email to Mr. Zimmerman (the "O'Leary Reply"). Ms. O'Leary, on behalf of the Union and the striking workers it represented, stated, "I restate: UFCW Local 342 continues to make an unconditional offer to return to work, and ***our position is that Sparks employees are locked out***." (A6; GC 9 at A231) (emphasis added).

During the hearing, one of the GC's witnesses, Lou LoIacono, Executive Director of the Union (Tr. at 174:8-18 (A137)), admitted that, during the January 20, 2015 bargaining session, in a side conversation with Sparks' counsel, he referred to the striking employees as "the locked out members." (Tr. 205:13-16; 206:19-22 (A139-A140)). To his credit, Mr. LoIacono admitted, "In my mind, they [the striking employees] were locked out." (Tr. 226:9-12 (A126)). He still held that

same opinion in May 2015, "[t]hat the Board was putting on a case against the employer for the locked out workers." (Tr. at 233:4-21 (A148)).

In the Lock Out Charge, filed by the Union with the NLRB on January 22, 2015 – a full month after the Zimmerman Response and the O'Leary Reply – the Union reiterated its position the Sparks employees were locked out – not discharged – since "on or about December 19, 2014," and alleged Sparks thereafter continued to "lock out for discriminatory purposes all of those employees" who participated in the Strike. (A31-32). On ***re-direct*** examination, Mr. LoIacono confirmed the reference in the charge to "locked out employees" meant the striking employees:

> Q: This charge, it was filed on January 22, 2015, correct?
> A: Yes.
> ***
> Q: And the charge references locked out employees. Who does that refer to?
> A: The members of Sparks.
> Q: The ones on strike?
> A: Who went on strike, yes.

(Tr. at 232:7-8, 19-23 (A147)).

Substantial evidence in the Record – evidence provided by the GC through both documents and the testimony of the GC's witnesses – demonstrates conclusively the striking employees were locked out.

As a matter of law, striking workers who are "locked out" are active employees and have not been discharged.

> [I]t is well settled that ***a lockout does not sever the employer-employee relationship***. … Indeed, ***a lockout pre-supposes the existence of an employment relationship between the employer and the employees it has locked out***. Persons who are not employed by an employer may no more be locked out by the employer than strike against the employer. Thus, ***persons who are locked out by an employer are viewed as having "permanent employee status."*** In short, ***the declaration of a lockout makes no sense with respect to persons who are not employees of the employer***. By declaring the employees locked out, the Respondent was necessarily, as a matter of Board law, declaring them to be its employees ….

Douglas Autotech Corp., 357 NLRB 1336, 1342-43 (2011) (footnotes omitted) (emphases added).

The Board, therefore, ignored substantial evidence and established law in finding Sparks discharged the striking employees through the Zimmerman Response. Consequently, the Board's Decision must vacated, and this Court must find Sparks did not discharge the striking employees.

A. The GC Failed to Prove Discharge

Even assuming *arguendo* the Union had not declared consistently the striking employees were "locked out" (which they were), the Board erred nonetheless in adopting the ALJ's finding that those employees were discharged, because the Record demonstrates conclusively the GC failed to prove a discharge. "'Where an unlawful discharge is alleged, it is self-evident that the General Counsel must show, first and foremost, a discharge.'" *Leiser Construction, LLC*, 349 NLRB 413, 415-16 (2007) (*quoting Nations Rent, Inc.*, 342 NLRB 179 (2004)) (*reversing* ALJ and

finding no discharge occurred). Here, as in *Leiser Construction*, the GC failed to do so.

First, the GC failed to call a single striking employee or Union representative who claimed to have been discharged. Indeed, the GC notably never even asked Mr. LoIacono (the Union's Executive Director), Ms. O'Leary, or any of the striking employees whom she called as witnesses whether Sparks discharged any, let alone all, of the striking employees. The only statements in the Record on this issue demonstrate the Union – from at least as early as when it received the Zimmerman Response in December 2014 (*see* O'Leary Reply), through at least the date the Complaint was issued in May 2015 (*see* Tr. at 226:9-12 (A146); 233:4-21 (A148)) – understood without exception the striking employees were ***not*** discharged, but rather were locked out. (*See also* Lock Out Charge (A31-32)).

Second, the absence of an aggrieved employee who thought she or he had been discharged distinguishes this matter from each of the three cases upon which the ALJ relied. In *Pride Care Ambulance*, 356 NLRB 1023, 1023-25 (2011), multiple striking employees thought themselves discharged by the statements of their employer. In *Leiser Construction* (upon which *Pride Care Ambulance* relies), one employee actually was discharged, and another thought he might have been. 349 NLRB at 413, 415-16 & n.18. In *Tri-State Wholesale Bldg. Supplies, Inc.*, the employer told the striking employees – in writing – they had been "terminated." 362

NLRB 730, 733, 734 (2015). In *Grosvenor Resort*, the employer issued a letter to the striking employers instructing them to "bring 'all their uniforms, hotel ID/timecard, and any other [of the Respon-dent's] property' to the Respondent's office on October 3, at which time they would receive their 'final check' for their 'final wages,' including any outstanding vacation pay." 336 NLRB 613, 617 (2001).

By contrast, the Zimmerman Response is completely devoid of any such language. It states only Sparks would not return the striking employees ***at this time***. (GC-9 at A231). Sparks thereby stated it was leaving open the possibility that, in the future, it might change its position. By using "the phrase 'at this time,' [the company] explicitly communicated that its plans were subject to change." *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1185 (9th Cir. 2004); *accord*, *Valdez v. Squier*, 676 F.3d 935, 946 (10th Cir. 2012) ("the phrase 'AT THIS TIME' means that the [decision made at a particular point in time may change] at another time"); *Kastel v. Commissioner of Internal Revenue*, 136 F.2d 530, 534 (5th Cir. 1943) (Holmes, J., *dissenting*) (the phrase "at this time" is synonymous with "presently," and "clearly indicates [a] temporary rather than permanent" state). Given the qualifier of "at this time," no reasonably prudent Sparks employee could construe the Zimmerman Response to be a discharge. In finding the Zimmerman Response created ambiguity, the ALJ – and the Board, in adopting that finding – acted arbitrarily and capriciously.

Furthermore, the Record demonstrates neither Sparks ***nor the Union*** ever shared the Zimmerman Response with any striking employees; to the contrary, Ms. O'Leary testified she merely forwarded the email to counsel. (Tr. 241-42 (A149-A150)). By force of logic, it is impossible for the striking employees to conclude Sparks discharged them if they never even received the employer's communication.

Third, the ALJ misapplied the "reasonably prudent employee" standard. As in the cases upon which the ALJ relied, that standard is applicable where there is a difference of opinion between the employer and the employee. As noted, no such difference of opinion can be found in the Record in this case; indeed, the ALJ mistakenly suggested it does not matter whether the striking employees themselves thought they had been discharged. (Tr. at 145:16-24 (A131); 352:8-354:14 (A155-A157)).

The ALJ misread the cases. "The appropriate inquiry is ***what the strikers reasonably would have understood*** about their employment status." *Pride Care Ambulance*, 356 NLRB at 1025 n.8; *accord*, *Tri-State Wholesale Bldg. Supplies*, 362 NLRB at 734 ("test for determining whether employees have been discharged is whether the employer's statements ***would reasonably lead the employees*** to believe that they had been discharged" (*citing Grosvenor Resort,* 336 NLRB 613, 617–618 (2001)).

Where, as here, the GC makes no attempt to demonstrate any of the reasonably prudent striking employees considered themselves as having been discharged by their employer's words or actions, the GC *a priori* cannot meet its burden of proving a discharge. Consequently, the Board's Decision must be vacated, and this Court must find Sparks did not discharge the striking employees.

B. Discharge is Not Supported by Substantial Evidence

Even had the GC elicited testimony from the Union or any of the striking employees that suggested a discharge (which the GC did not attempt, let alone achieve), substantial evidence in the Record demonstrates a reasonably prudent Sparks employee would not have concluded she or he had been discharged. Unlike *Grosvenor Resort*, Sparks never instructed the Striking employees to turn in their uniforms, to clear out their lockers, or to pick up their final checks. Sparks did just the opposite.

> Q [Sparks]: Lockers. On January 8[, 2015, at the bargaining session], you pulled Marc [Zimmerman] aside and you said ["]I want to talk to you about the employee[s]' lockers,["] correct?
> A [LoIacono]: Yes.
> Q: And he told you that they were still there, they were not touched, correct?
> A: Yes.
> Q: And if the employees wanted anything, just tell him and [Sparks] would arrange for them to be able to get them, right?
> A: Yes.
> Q: And he said they [the lockers and their contents] were still there because [the striking workers are] still active employees, right? Didn't he say that?
> A: I don't recall.

(Tr. at 222:25–223:12 (A142-A143)).

The striking employees learned not only from Sparks, but also from independent third-party providers, they were not considered discharged. For example, when striking employees tried to withdraw funds from their 401(k) accounts, the plan administrator – Fidelity – told them they cannot do so because they had not been terminated, and termination was a requirement under the plan. (Tr. 171:24-172:18). The Union raised this very issue during the January 20, 2015 bargaining session, and was told unequivocally the striking employees were not discharged, but rather are active employees. (Tr. at 205:1–207:8 (A139-A141); 657:4–660:14 (A197-A200)). In addition, although Sparks' benefits provider initially indicated at least one striking employee had been terminated through letter dated January 16, 2015, in a subsequent letter dated February 9, 2015, the benefits provider acknowledged its mistake and changed the striking employee's status from a termination to a "reduction in hours." (GC-8 at A219 *cf.* R-2 at A421; A427).

Finally, during the hearing, Lou LoIacono, the Union's Executive Director, conceded the Union would have filed an unfair labor practice Charge against Sparks if the striking employees had been discharged, and conceded further the Union never filed such a Charge against Sparks at any time; not during the more than five months between the start of the Strike on December 10, 2014 and the issuance of the Complaint on May 29, 2015, and not during the ensuing five months between the issuance of the Complaint and the conclusion of the hearing.

> Q [Sparks]: Now when employees are discharged or terminated and you represent those employees, you'll do something, correct? You'll take action.
> A [LoIacono]: I would imagine so.
> Q: If you had a contract, you [would] file a grievance.
> A: Yes.
> Q: If you didn't have a contract, like here where you're negotiating, you file an unfair labor practice charge, wouldn't you?
> A: Yes.
> Q: You haven't filed an unfair labor charge saying discharge, correct?
> [Union Counsel]: Objection to the form of the question. Is he asking if Lou LoIacono personally filed it? Is he asking those are the words? Is he asking if the Union filed it?
> [ALJ]: To the best of your knowledge, sir, did the Union ever file an unfair labor practice charge alleging that the employees were discharged?
> [LoIacono]: Not to my knowledge.

(Tr. at 225:14–226:7 (A145-A146)).

Accordingly, the Board erred in finding a reasonably prudent Sparks employee would have thought she or he had been discharged, as such a finding is not supported by substantial evidence in the Record, and in fact is contrary to a preponderance of the evidence in the Record. *See Leiser Construction*, 349 NLRB at 415-16 (*reversing* ALJ and finding no discharge occurred). Consequently, the Board Decision must be vacated, and this Court must find Sparks did not discharge the striking employees.

C. Sparks' Decision not to Immediately Disclose Permanent Replacements was Consistent with Established Precedent

The Zimmerman Response intentionally did not disclose Sparks hired permanent replacements for the striking employees. It withheld that information under the protection and guidance of *Avery Heights*, 448 F.3d at 189. The ALJ, citing *Avery Heights*, acknowledged, "[o]f course, Sparks was not required to" make that disclosure in the Zimmerman Response. (A16).

On either side of that acknowledgment, however, the ALJ impermissibly chipped away at the *Avery Heights* protections. "The issue of the striking employees' understanding is further complicated here by the fact that Sparks did not inform the union or the striking employees that it was hiring permanent replacement employees." Ibid. This statement undermines *Avery Heights* because it means an employer puts itself at risk of "creating ambiguity" as to the status of striking employees by invoking its *Avery Heights* rights. The ALJ then swings the ax from the other direction, imposing – without citing any authority – a new obligation on employers relying on the contrary pronouncement in *Avery Heights*: an affirmative duty to disclose (by some unspecified time) not only the fact permanent replacements were hired, but also (again, by some unspecified time, but before requested to do so) the existence of a preferential hiring list, and to deliver it to the striking employees. Ibid.

In making these statements, the ALJ impermissibly misinterpreted both *Avery Heights* and the Zimmerman Response. As the Second Circuit held, legitimate reasons may exist for secrecy regarding the hiring of permanent replacements, including "fear of picket-line-violence." *Avery Heights*, 448 F.3d at 195. Those very reasons presented themselves at Sparks.

In the wake of the Strike, Sparks hired a security company to protect its non-striking employees, its customers, and its property. At the hearing, one of the principals of that company testified at length about the picket-line violence Sparks already had experienced before Ms. O'Leary sent the Unconditional Offer, including broken windows and the striking employees' confrontation of customers. (Tr. at 368:1–381:16 (A164-A177)).

Against that background, Sparks received and responded to the unconditional offer set forth in Ms. O'Leary's December 19, 2014 email to Mr. Zimmerman.[5] As

[5] Ms. O'Leary's email gives rise to issues for which there appear to be no precedent. First, whether an unconditional offer may be delivered by email. Second, whether the offer is deemed delivered at the time it is sent, or at the time it is received (i.e., read) by the employer. Third, when (as happened here) the email is neither addressed nor copied to the employer, whether it is effective when first read, when read by the employer, or not at all. These issues are not academic, as the Record contains no information suggesting, let alone proving, Mr. Zimmerman – at best an agent for Sparks for only some specific matters – had authority to decide whether to accept an offer of return to work (whether unconditional or otherwise). To the contrary, the evidence demonstrates Mr. Zimmerman did not see Ms. O'Leary's email until some twelve hours after it was sent, and was constrained from responding to it substantively for another forty-eight hours because he lacked authority to do so and needed direction from Sparks' ownership. (*See* GC-9 at A231-232). Given the

in *Avery Heights*, Sparks made the decision not to disclose the fact it hired permanent replacements out of fear of inflaming the situation on the picket line and the possibility of exacerbating violence there. It set forth those facts in the Zimmerman Response, and thereby established a judicially-recognized legitimate reason for secrecy about the permanent replacements.

The ALJ chastised Sparks for "shifting positions" as to why it did not accept the unconditional offer, having mentioned picket-line violence in the Zimmerman Response, but relying instead on the hiring of permanent replacements in its post-hearing brief. (A16) (Implicitly, the ALJ is accusing Sparks of an illicit motive in rejecting the unconditional offer, even though illicit motive never was raised before the ALJ and was not advanced by the Board). The ALJ failed to grasp the hiring of permanent replacements ***always*** was the primary reason, but simply was not disclosed in reliance upon *Avery Heights*.

As demonstrated by all or any of the foregoing, the Board erred and/or acted arbitrarily and capriciously in finding Sparks, through the Zimmerman Response, discharged the striking employees. Consequently, the Board's Decision must be vacated, and this Court must find Sparks did not discharge the striking employees.

Charges, the Complaint, and the GC's concessions at the hearing all acknowledged Sparks had hired permanent replacements, Sparks had no reason to raise these issues at the hearing. *See*, *infra*, Point III.

III. The Board Erred in Finding Sparks Did Not Prove It Hired Permanent Replacement Employees

In a single sentence in a footnote, the Board alludes to its "finding that [Sparks] failed to establish it had permanently replaced the striking employees" in response to the Strike. (A1, n.4.) Procedurally, that finding is precluded as a matter of law, because the issue whether Sparks hired permanent replacements was conceded by the GC in the Complaint and during the hearing – and therefore never litigated – before the ALJ. The GC impermissibly raised the issue for the first time in its post-hearing brief; the ALJ improperly – and in derogation of Sparks' due process rights – considered and decided the issue on the merits; the Board committed prejudicial error by denying Sparks' Motion to Reopen the Record to receive documentary evidence relevant to and determinative of the issue, documentary evidence Sparks produced to the GC prior to the hearing. Substantively, the evidence introduced and testimony elicited at the hearing proves Sparks hired permanent replacement employees to replace the Striking employees prior to the Union's Unconditional Offer.

For all or any of these reasons, the Board's Decision must be vacated, and this Court must either find Sparks met, or was relieved of meeting, its burden of proof, or receive into the Record the documentary evidence the ALJ conceded would have done so, as specified in Sparks' Motion to Reopen the Record, and remand the issue to the Board.

A. The GC Conceded Sparks Hired Permanent Replacements

The Complaint, as originally issued, expressly states it is limited to the Solicitation Charge and the Lock Out Charge. (A35). Neither of those Charges accuses Sparks of failing to hire permanent replacements. (*See* A21-28; A29-30; A31-32). The Complaint itself, therefore, never alleges Sparks failed to hire permanent replacements.

To the contrary, in the Complaint, the Regional Director implicitly concedes Sparks ***did*** hire permanent replacements:

> Since on or about December 19, 2014, Respondent has denied the striking employees, described above in paragraph 6, their right to be placed on a preferential hiring list.

(A38). The source of the striking employees' "right to be placed on a preferential hiring list" is *Laidlaw Corp.*, 171 NLRB No. 175 (1968), *enf'd* 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). That right comes into being when, and ***only*** when, an employer has hired permanent replacements for the striking employees. *Id*. In the Complaint, therefore, the Regional Director conceded Sparks had hired permanent replacements.

In the Amended Complaint issued on September 18, 2015, the Regional Director directly conceded Sparks had hired permanent replacements. Specifically, the Regional Director sought a make whole remedy for the striking employees "from the date of their [alleged] discharge – December 22, 2014 – with interest, despite ***the***

fact Respondent had hired permanent replacement workers before the date of [the alleged] discharge." (A47) (emphasis added).

Like the Regional Director, the GC also conceded Sparks had hired permanent replacements. On September 15, 2015, the GC served a Subpoena *duces tecum* upon Sparks. (A53-61). On September 25, 2015, Sparks served a Petition to Revoke the Subpoena. (A77-81). In its Opposition to the Petition to Revoke, dated September 29, 2015, the GC reiterates the allegation in the Complaint that Sparks "denied [the striking] employees the right to be placed on a preferential hiring list." (A63) (footnote omitted).

In explaining the relevance of documents sought by the Subpoena, the GC again concedes the fact Sparks had hired permanent replacements by stating, "these documents are directly related to the Complaint allegation, which alleges that [Sparks] has failed and refused to reinstate strikers ***to open positions*** to date." *(*A67) (emphasis added). In the absence of permanent replacements, an employer is required to reinstate striking employees immediately, regardless of having hired non-permanent or temporary replacements. The GC's inclusion of the qualifying language "to open positions" demonstrates the GC's concession that Sparks had hired permanent replacements.

The GC makes the concession even more directly in justifying specific categories of documents demanded by the Subpoena. For example, in justifying the categories set forth in Paragraph 2 of the Subpoena, the GC states:

> Under well-settled law, economic strikers who unconditionally apply for reinstatement ***at a time when their positions are filled by permanent replacements*** remain employees and are entitled to full reinstatement ***upon departure of the replacements*** …. Here, the Complaint alleges that [Sparks] failed and refused to return strikers to work after their unconditional offer to return to work, ***despite the availability of positions and the continued departure of replacement employees*** in the weeks and months following the offer to return to work.
>
> … Additionally, the document request extends through the present time, since [Sparks] has ***a duty to reinstate the strikers as positions become available***, and it is impossible to tell ***whether and when any vacancies have occurred*** without these records.

(A68-69) (citations omitted) (emphases added).

Similarly, the GC explains Paragraph 5 of the Subpoena "seeks documents that will reflect all employees hired by [Sparks] … from October 1, 2014 to the present time." (A70). In justifying its demand for such documents, the GC states, "the information sought under this paragraph is directly relevant to the Complaint allegation that [Sparks] failed and refused to reinstate strikers ***to open positions*** upon their unconditional offer to return to work." Ibid (emphasis added). As above, the qualifying phrase "to open positions" applies only when an employer hired permanent replacements prior to receiving an unconditional offer to return to work.

The phrase "permanent replacements" is a term of legal significance to describe those employees hired during a strike who are protected from displacement by returning strikers. *Internal Ass'n of Machinists & Aerospace Workers v. J.L. Clark Co.*, 471 F.2d 694, 698 (7th Cir. 1972) (*citing NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938)). By definition, a permanent replacement is one with whom an employer has reached a mutual understanding to replace economic strikers prior to the time of an unconditional offer of return to work. *Detroit Newspaper Agency*, 343 NLRB 1041, 1042 (2004).

When an employer lawfully replaces striking employees with others in an effort to carry on business, that employer has not committed an unfair labor practice. *Mackay Radio & Telegraph*, 304 U.S. at 346. An employer is not required to discharge those hired to fill the places of strikers when the latter elects to resume their employment. *Id.* An unfair labor practice for failing to reinstate striking employees when permanent replacements are hired only occurs when the sole reason for failing to reinstate is the striking employees' participation in union activity. *Id.*

Throughout the hearing, the GC – and, indeed, even the ALJ – repeatedly conceded the workers hired by Sparks in response to the Strike were permanent replacements. For instance, the GC interrupted the opening statement of Sparks' counsel (more than once) to reiterate the limited scope of the Complaint:

> The legitimate and substantial business specification [sic] is ***in not returning employees to work as positions were available*** after the

> unconditional offer to return to work. It's not that[, "]did you have that justification ***for hiring the permanent replacements***[?"]. And I didn't know that we had to stip to it because it wasn't in the Complaint.

(Tr. at 362:14-19 (A161)) (emphases added). The ALJ concurred: "it was my understanding that anti-union animus was not being alleged as a motivation ***for hiring the permanent replacements in the first place***." (*Id*. at 362:23-25 (A161)) (emphasis added). The GC replied, "We're not saying that the Employer had an unlawful motive ***in hiring the permanent replacements at the time they did,*** so." (*Id*. at 363:8-10 (A162)). And, removing any possible doubt whatsoever, the GC succinctly stated, "***We're not disputing the hiring***." (*Id*. at 364:18 (A163)) (emphasis added).[6]

Therefore, the hiring of permanent replacements was neither disputed nor at issue before the ALJ. The ALJ confirmed this point more than once during the hearing. "The case has to do with a violation of *Laidlaw* rights [of the striking employees." (Tr. at 111:11-12 (A130)). The hiring of permanents replacements is not "a violation of *Laidlaw* rights"; to the contrary, the hiring of permanent replacements is a necessary condition to the existence of *Laidlaw* rights. As the ALJ

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[6] *See also*, Tr. 355:24-25 (A158) (GC: "we're not litigating unlawful motive ***for hiring permanent replacements***"); 361:24-362:4 (A160) (ALJ: "***the permanent replacements*** themselves constituted a legitimate business and substantial business reason – you know – for putting people on the Preferential Hiring List to the extent they were not discharged"); 364:7-9 (A163) (GC: "we're not alleging that ***you hired permanent replacements*** for any given reason").

made plain, "[t]he complaint alleges that the employees were discharged on December 22, 2014, and that, in the alternative, Sparks refused to reinstate them ***as openings became available***." (*Id*. at 145:11-13 (A131)) (emphasis added).

Indeed, the issue raised by the GC was not whether Sparks hired permanent replacements, but whether Sparks hired ***enough*** permanent replacements to staff the restaurant properly; i.e., whether there were any "openings" that Sparks needed to fill with striking employees. In its opening statement, the GC stated, "Sparks will be unable to show that it hired replacements ***for all 36 employees who went on strike***." (*Id*. at 16:19-20) (emphasis added). "You will also learn," the GC continued, "that at the time the employees offered to return to work on December 19th, ***Sparks had not replaced all the strikers*** and that positions were available for the former striker to return to work." (*Id*. at 17:13-16) (emphasis added).[7]

Based upon the foregoing facts, Sparks did not prepare or present a defense to address whether or when it hired permanent replacements for the striking employees. Sparks possessed – and, pursuant to the Subpoena, had produced to the GC – the very documentary evidence that answered those questions definitively; namely, the "Daily Tip sheets and Weekly Tip records which," the ALJ noted correctly, "would

[7] To address this issue and demonstrate the number of permanent replacements hired, Sparks presented witness Susan Edelstein, and introduced documentary evidence: an offer letter signed by each permanent replacement. (*See* R 7A-HH at A437-470).

have established the precise dates that the newly hired employees began working and that former kitchen employees worked as waitstaff ...."[8] (A10).

B. The GC is Estopped from Contesting Whether Sparks Hired Permanent Replacements

Given the GC's repeated concessions that Sparks lawfully hired permanent replacements, the GC as a matter of law was estopped from arguing Sparks did not do so. It nonetheless did so, for the first time, in its post-hearing brief.

Estoppel against a government agent requires a showing that his or her conduct can be characterized as a misrepresentation or concealment, or that the agent at least behaved in ways that have caused an egregiously unfair result. *Gen. Accounting Office v. Gen. Accounting Officer Personnel Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983). A party claiming estoppel must show: 1) a definite representation to the party claiming estoppel; 2) that party's reliance on its adversary's conduct in such a manner as to change his position for the worse; 3) that such reliance was reasonable; and 4) that the government engaged in affirmative

[8] The ALJ inexplicably, and incorrectly, accuses Sparks of not having produced this documentary evidence. Ibid ("Sparks failed to produce records having a direct probative bearing on this issue"). During the hearing, the GC admitted Sparks ***had*** produced those very documents. (Tr. at 73:15-16 (A129)) ("I mean I have them [the tip sheets] – I'm not marking them as exhibits"); *see generally*, *id*. at 9:20-24 (Sparks produced two discs and a flash drive). The ALJ later compounds this critical error by drawing an adverse inference from the baseless assumption Sparks failed to produce this documentary evidence. (A10) (*citing Zapex Corp.*, 235 NLRB 1237, 1239 (1978)). That mistake of fact alone warrants vacating the Board Decision and remanding the case to the Board.

misconduct. *Frank LLP v. Consumer Financial Protection Bureau*, 288 F. Supp. 3d 46 (D.C. Cir. 2017); *Genesis Health Ventures, Inc. v. Sebelius*, 798 F. Supp. 2d 170, 183-84 (D.C. Cir. 2011).

In this matter, the government agent (the Regional Director and the GC) repeatedly represented its acceptance of the fact Sparks had hired permanent replacements. The Regional Director made those representations in the Complaint and the Amended Complaint; the GC made them in the Opposition to the Petition to Revoke the Subpoena, and throughout the hearing "in open court." Sparks relied on those representations to prepare and present its case before the ALJ. The GC then engaged in "affirmative misconduct" by abandoning its representations, raising in its post-hearing brief the issue whether Sparks had hired permanent replacements, asking the ALJ to draw an adverse inference from Sparks' "failure" to introduce the Weekly Tip records and Daily Tip sheets, and did so even though the GC had those very records and, therefore, knew they disproved the adverse inference it requested. Finally, as demonstrated by the ALJ's Decision and the Board's affirmance of that Decision, Sparks relied on those representations to its detriment.

The Board erred or acted arbitrarily and capriciously in failing to find the GC was estopped from claiming Sparks had not hired permanent replacements in response to the economic strike that began December 10, 2014. Consequently, the

Board Decision must be vacated, and this Court must hold the GC was so estopped, and must find Sparks had hired permanent replacements.

C. The Board Denied Sparks its Due Process Rights

By raising for the first time in its post-hearing brief the accusation Sparks had not hired permanent replacements (and doing so after conceding that issue in both its Complaint and Amended Complaint), the GC denied Sparks its Due Process rights. By finding Sparks had not hired permanent replacements, the Board likewise denied Sparks its Due Process rights.

This Court refuses to enforce an order where, as here, the complaint fails to make the supporting allegation and the respondent was denied a meaningful opportunity to litigate the underlying issue.

> The applicable law is clearcut. Both the Administrative Procedure Act and the Board's own rules require that the complaint inform the Company of the violations asserted. The Board may not make findings or order remedies on violations not charged in the General Counsel's complaint or litigated in the subsequent hearing. Even where the record contains evidence supporting a remedial order, the court will not grant enforcement in the absence of either a supporting allegation in the complaint or a meaningful opportunity to litigate the underlying issue in the hearing itself.

NLRB v. Blake Construction Co., 663 F.2d 272, 279 (D.C. Cir. 1981) (footnotes and internal citations omitted).

In this matter, as in *Blake Construction Co.*, the GC and the Board ignored the limitations imposed by allegations in (and missing from) the Complaint. The

Regional Director twice conceded Sparks had hired permanent replacements. *See* Complaint ¶ 7.c. (A38) (Sparks denied striking employees "right to be placed on a preferential hiring list"); Amended Complaint (A47) (adding make whole remedy "despite ***the fact Respondent had hired permanent replacement workers*** before the date of [the alleged] discharge") (emphasis added).

Against this background, if the GC was going to change its position and allege Sparks had not hired permanent replacements, it was incumbent upon the GC to give notice to Sparks. It failed to do so, much like the GC in *Blake Construction Co.*:

> At no point in the hearing do we find a clear statement from the counsel for the General Counsel (General Counsel) to the Company or the ALJ that the Company was on trial for its failure to [do something not alleged in the complaint]. On the contrary, we garner both from what the General Counsel did say on several occasions and from what, on other occasions, inexplicably, he did not say, that, notwithstanding any possible ambiguity in the complaint, he was not pursuing the [allegation] now challenged by the Company.

663 F.2d at 280. The GC's failure to do so denied Sparks its Due Process rights. "Elemental procedural due process prevents this court from granting enforcement of remedies that go beyond the scope of the complaint and are directed toward violations of the Act not noticed or actually tried before the ALJ or the Board." *Id.* at 283.

The Record demonstrates the issue whether Sparks had hired permanent replacements never was raised in the Complaint, nor was it litigated before the ALJ.

> It is a basic tenet of administrative law that each party to a formal adjudication must have a full and fair opportunity to litigate the issues to be decided by the agency. Where a party utterly fails to raise a significant issue before the ALJ, the record developed with regard to that issue will usually be inadequate to support a substantive finding in its favor, and, generally speaking, neither the ALJ nor the Board should consider such an issue.

Trident Seafoods, Inc. v. NLRB, 101 F.3d 111, 116 (D.C. Cir. 1996) (*citing Conair Corp. v. NLRB*, 721 F.2d 1355, 1371-73 (D.C. Cir. 1983)). In *Conair Corp.*, this Court held where, as here, the GC first raised an issue in its post-hearing brief, "that issue, we believe, should not have been reached by the Board, for [Respondent] was never told before the hearing record closed" that it was in jeopardy as to that issue. *Id*. Indeed, where a GC raises a substantial issue for the first time in a post-hearing brief, it places an undue burden on a respondent and deprives it of an opportunity to present an adequate defense. *Camay Drilling Co.*, 254 NLRB 239, 240, n. 9 (1981).

The GC first argued Sparks had not hired permanent replacements in its post-hearing brief. In finding Sparks had not hired permanent replacements, the Board denied Sparks its Due Process rights. Consequently, the Board Decision must be vacated, and this Court must deny enforcement of the Board's Order.

D. The Board Committed Prejudicial Error by Denying the Motion to Reopen the Record to Admit the Weekly and Daily Tip Sheets

The ALJ states, "Daily Tip sheets and Weekly Tip records which would have established the precise dates that the newly hired employees began working and that

former kitchen staff worked as waitstaff … were not produced by the Respondent. (A10). The ALJ errs in stating Sparks did not produce that documentary evidence.

On the first day of the hearing, the GC admits Sparks produced the tip sheets.

> ALJ: Can somebody show him [the witness] and me one of these tip sheets?
> GC: I mean ***I have them*** -- I'm not marking them as exhibits. …

(Tr. at 73:13-16 (A129) (emphasis added); *see id*. at 9:20-24 (A117), 24:1-8 (A127), 307:11-20, 9:15-16 (A117)) (Sparks produced five years of documents, some 28,000 pages).[9]

For the reasons stated in Points III.B. and III.C., *supra*, Sparks did not introduce into evidence "either Weekly or Daily Tip records for one of the most significant weeks in question, December 15 through 21, 2014." (A11).

[9] The ALJ's error was compounded by the fact she relied upon it to draw two adverse inferences against Sparks, each of which addressed the issue of whether Sparks had hired permanent replacements. (*See* A10-12). The drawing of an adverse inference is an "extreme sanction that should not be imposed lightly." *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 120 (S.D.N.Y. 2008); *see also Jenkins v. Bierschenk*, 333 F.2d 421, 425 (8th Cir. 1964). A negative inference is appropriate only when a party or witness withholds relevant and important evidence as to which he has knowledge and which is peculiarly within his control so as to conclude the evidence would harm his case, or the case of his principal. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). By contrast, the evidence here favors and exculpates Sparks, by demonstrating Sparks hired permanent replacements. Accordingly, the Board erred or acted arbitrarily and capriciously in failing to negate the adverse inferences drawn by the ALJ. This Court must vacate the Board Decision, and find no basis exists for the adverse inferences.

Notably, however, the ALJ acknowledged "[s]uch records, by establishing any shifts worked by alleged replacement employees, would tend to substantiate [Sparks'] claim that the striking employees were permanently replaced prior to their [the striking employees] unconditional offer to return on December 19 at 4 p.m." Ibid.[10]

Given the acknowledged probative, and likely determinative, value of the Weekly Tip records and Daily Tip sheets for the period December 15 through 21, 2014 – the ALJ called it "critical" (*see, e.g.*, A7) – and given the reason Sparks never introduced them into evidence even though the ALJ kept open the Record after the close of testimony (*see* Tr. at 568:1-5 & 8-9 (A196)), Sparks filed a Motion to Reopen the Record to include this "critical" documentary evidence.

In a footnote, the Board denied Sparks' motion to reopen, finding the evidence "has not been shown to be newly discovered or previously unavailable, as required by Sec. 102.48(c)(1) of the Board's Rules and Regulations." (A1, n. 3).

Although the Board may grant a motion to reopen in order to receive newly discovered or previously unavailable evidence, that is not the sole basis for doing so. Section 102.48(c)(1) allows the Board to grant such a motion to receive "evidence

[10] The ALJ's Decision is bereft of any explanation as to how the alleged unconditional offer communicated to a third-party security guard between 3:30 and 4:30 p.m. – an offer never mentioned by Ms. O'Leary in the Unconditional Offer sent by email to Mr. Zimmerman – qualifies as a valid unconditional offer made to the employer.

which the Board believes may have been taken at the hearing ..." 29 C.F.R. § 102.48(c)(1). This language appears to be a catchall provision, allowing the Board to exercise its discretion in unforeseen situations such as the one present here, where exculpatory evidence was not introduced because of the absence of a specific allegation in the complaint.

In these peculiar circumstances, it is respectfully submitted the Board must review the content of the documentary evidence to determine whether it "may have been taken at the hearing" had the issue properly been raised and litigated. The ALJ already answered that question in the affirmative by noting this documentary evidence was "critical," characterizing them as "records having a direct probative bearing on this issue" of the hiring of permanent replacements. (A11).

The Board's summary denial of Sparks' Motion to Reopen the Record, therefore, constitutes prejudicial error under the Section 706 of the Administrative Procedure Act:

> This Court recognizes the injustice wrought by prejudicial error.
>
> "There are sometimes errors at a trial that deprive a litigant of the opportunity to present his version of the case. These are also ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment. When, for example, an appellant has been deprived of the opportunity to summon witnesses, the appellate court can hardly determine what testimony would have materialized but for the error. No subjunctives can fill the void in a very present record."

Ozark Auto. Distribs., Inc. v. Nat'l Labor Relations Bd., 779 F.3d 576, 586 (D.C. Cir. 2015) (*quoting* Traynor, The Riddle of Harmless Error 68 (1970)).

(Furthermore, regardless of any motion to reopen, the Weekly Tip records and Daily Tip sheets are, or should be deemed, part of the Record. The Board's Rules and Regulations state the record shall include, *inter alia*, "the transcript of the hearing, stipulations, exhibits, [and] documentary evidence." 29 C.F.R. § 102.45(b). Those documents were produced by Sparks to the GC pursuant to the Subpoena and, therefore, are documentary evidence in the possession of the agency).

The Board committed prejudicial error by denying Sparks' Motion to Reopen the Record for the purpose of including the Weekly Tip records and Daily Tip sheets. Consequently, the Board Decision must be vacated, and this Court must remand the issue to the Board, with direction to include those documents in the Record.

IV. Substantial Evidence Demonstrates Sparks Hired Permanent Replacements

Uncontroverted testimony and evidence demonstrate Sparks hired permanent replacements in response to the Strike, and before Sparks received the Union's Unconditional Offer. (*See* GC-9 at A232-233). As the ALJ herself acknowledges, Sparks immediately began interviewing and hiring replacements, and "[t]he evidence establishes that Sparks obtained replacement employees via three different methods": six through reassignment from kitchen to waitstaff; five through conversion of seasonal employees; and twenty-three new hires. (A8-A9). The

evidence further demonstrates Sparks issued offer letters to all 34 permanent replacements: "Two of the letters were dated December 11, 2014, 26 were dated December 15, and six were dated December 19." *Id.*; (*see* R 7A-HH at A437-470).

Susan Edelstein, Sparks' human resources consultant, testified, "I know [the date] that the last person [returned the offer letter] – I don't know it. It was – you know, whenever it was issued, it was within a day or so that we got them back. So whenever the last one was issued is when I got it back. I don't know the exact last day." (A10 (*citing* Tr. at 426)). Ms. Edelstein then asked to see the letters and, upon reviewing them, stated, "It was – I believe it was the 19th of December. The last day that we got this one – these back." Ibid.

The ALJ interpreted this testimony to mean "it is doubtful that ***all*** of the offer letters were received with employee signatures as of" December 19, 2014. Ibid (emphasis added). As stated by the ALJ, however, that interpretation reveals only one part of the picture. Although it may be "doubtful that ***all*** of the offer letters" were signed and returned by December 19, 2014, based on Ms. Edelstein's uncontroverted testimony, it is also highly likely that ***at least 28*** of the offer letters were signed and returned by that date; indeed, if ***all*** of the offer letters were signed and returned "a day or two" after they were dated, then at least 28 of 34 of them were signed by Wednesday, December 17, 2014 – at least two days ***before*** the Union made its Unconditional Offer.

By the ALJ's own logic, therefore, the evidence in the Record demonstrates Sparks hired at least 28 permanent replacements before the Union made its Unconditional Offer. Given that inescapable fact, the ALJ, and the Board thereafter, acted arbitrarily and capriciously in finding Sparks did not hire ***any*** permanent replacements. (A1, n. 4). *See*, *SuperValu, Inc.*, 347 NLRB 404, 405-06 (2006) (not all striking employees replaced at time of unconditional offer; Board recognizes employer already hired permanent replacements for 33 of 36 striking employees). Consequently, the Board Decision must be vacated, and this Court must find Sparks hired at least 28 permanent replacements before the Union made its Unconditional Offer.

Furthermore, the Board erred in determining "mutual understanding" solely by the date by which a permanent replacement had returned a signed offer letter. Although an offer letter signed by a replacement employee before the employer receives an unconditional offer of return to work is irrefutable evidence of a mutual understanding between employer and employee, it is not required. Indeed, this Court has reversed the Board and held the employer's ***unilateral post-hiring*** statements demonstrated the required mutual understanding. *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 390-91 (D.C. Cir. 1995). In *Gibson Greetings*, this Court held "all employees to whom the company made the promises contained in that [post-hiring]

document became, without doubt, permanent hires." *Id*. at 391 (reversing Board for want of substantial evidence on the record considered as a whole).

Applying to this matter the lesson of *Gibson Greetings*, all employees to whom Sparks issued offer letters prior to the Union's Unconditional Offer became permanent replacements. That remains true even if the permanent replacement started work after the striking employees made their Unconditional Offer. *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971), *enf'd in relevant part*, 456 F.2d 357 (2d Cir. 1972); *accord*, *SuperValu, Inc.*, 347 NLRB at 416.

Accordingly, the Board's finding is not supported by substantial evidence. Consequently, the Board Decision must be vacated, and this Court must find Sparks hired 34 permanent replacements before the Union made its Unconditional Offer on December 19, 2014, regardless whether those replacements signed and returned the offer letters, or even worked a shift, by that date.[11]

[11] Given the substantial evidence demonstrating (and/or the GC's concessions that) Sparks hired permanent replacements, this Court must limit the striking employees' remedy to reinstatement and backpay from the date a *Laidlaw* vacancy arises. *See Tri-State Wholesale*, 362 to NLRB No. 85, at 7; *see also Detroit Newspapers*, 343 NLRB at 1041-1042 (citing *Hormigonera Del Toa, Inc.*, 311 NLRB 956, 957-58 & fn. 3 (1993) (permanently replaced striking employee entitled only to reinstatement upon departure of replacement employee); *MacKay Radio & Telegraph*, 304 U.S. at 346 (same).

V. Substantial Evidence Demonstrates Sparks Complied with *Laidlaw*

Substantial evidence in the Record supports a finding Sparks created and maintained a preferential hiring list, and, using that list, properly recalled striking employees upon the departure of permanent replacements, in compliance with *Laidlaw Corp*., 171 NLRB 1366, 1369-70 (1968).

Ms. Edelstein testified Sparks created a preferential hiring list after the waiters went out on strike. (Tr. 427:19-23 (A187)). The Union did not formally request a copy of the preferential hiring list from Sparks until August 25, 2015. (GC-5 at A210). Sparks honored the Union's request and sent a copy of the list to Mr. LoIacono on September 11, 2015. (GC-6 at A211).

Prior to that time, on August 25, 2015, Sparks had occasion to use the list. Following the departure of an employee, Ian Morrison, Sparks offered reinstatement to striking employee Adnan Nuredini. (GC-10 at A234; GC-4 at A209). When Mr. Nuredini failed to respond, Sparks offered reinstatement to the next-senior striking employee, Ante Ivce. (GC-11 at A235; GC-12 at A236). Mr. Ivce accepted the offer of reinstatement.[12]

[12] To ensure compliance with *Laidlaw*, Sparks not only created and maintained the list, but altered its policy such that no hires were to occur without the approval of Steve Cetta. (Tr. 253:12-14; 428:23–429:1). In a clear example of Murphy's Law, there was an instance in which things didn't work as planned. Although no business need existed to hire anyone, someone was hired outside the process. When Mr. Cetta and Ms. Edelstein discovered the mistake, the individual – affiliated with Sparks less than a week – was fired immediately. (Tr. 427:10-16 (A187); 551:3–552:22).

Notably, the Regional Director acknowledged the existence of the preferential hiring list and, as part of 10(j) Stipulation, required Sparks to "***[c]ontinue*** to maintain its preferential recall and reinstatement list," and use it to recall striking employees. If Sparks failed to do so, the Stipulation obligated to the Board to file a Section 10(j) petition in Court. *See* Stipulation ¶¶ 3.b., 5.a. (A94). No such petition was filed.

Accordingly, substantial evidence in the Record demonstrates Sparks complied with its *Laidlaw* obligations. The Board did not pass on the issue whether Sparks placed striking employees on a preferential hiring list. (A1, n.4). Consequently, this Court must vacate the ALJ Decision as unsupported by substantial evidence in the Record.

VI. Sparks Had a Legitimate and Substantial Business Reason to Reduce its Waitstaff

The Record is filled with data demonstrating Sparks suffered a significant decline in business in 2015 as compared to prior years. The GC previously conceded sales was the best measure of a decline in business. (*See* A69, n. 10). The ALJ found a decline in sales. (A12).

In the restaurant business, especially where the issue is the necessity of reducing waitstaff, a more compelling data set is tips per waiter. Sparks introduced this data (R21–R26 at A532-A944); the ALJ ignored it.

The data is compelling. Even with a reduced waitstaff in 2015, tips per waiter either stayed even or fell almost every night as compared to the same night in 2014.

If Sparks had been required to maintain its 2014 complement of waiters in 2015, those tips per waiter would have plummeted.

The Board finding that Sparks did not suffer a decline in business justifying a reduction in waitstaff from the 2014 levels is not supported by substantial evidence. Consequently, the Board Decision must be vacated, and this Court must find Sparks had a legitimate and substantial reason to reduce its waitstaff roster in 2015.

CONCLUSION

For the reasons set forth herein, Petitioner Michael Cetta, Inc. d/b/a Sparks Steakhouse respectfully requests the Court: vacate the Board Decision in all respects; find Sparks did not discharge the striking employees, did hire permanent replacements for the striking employees, did not fail to place the striking employees on a preferential hiring list, and did have legitimate and substantial reasons to reduce its waitstaff; and conclude Sparks did not in any way violate Section 8(a)(3) and (1).

New York, New York
Dated: February 11, 2019

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Corrected Brief for Petitioner to be served on counsel for Respondent via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity:

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I certify that an electronic copy was uploaded to the Court's electronic filing system. Upon the Court's approval, eight paper copies of the foregoing Corrected Brief for Petitioner will be sent to the Clerk's Office by Federal Express Next Business Day Delivery to:

Clerk of Court
United States Court of Appeals, District of Columbia Circuit
333 Constitution Avenue, N.W., Room 5423
Washington, D.C. 20001
(202) 216-7300

on this 12th day of February 2019.

/s/ Samantha Collins
Samantha Collins

ADDENDUM

NLRA § 8, 29 U.S.C. § 158:

(a) **Unfair labor practices by employer.** It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

…

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership….

NLRA § 10, 29 U.S.C. § 160:

(a) Powers of Board generally.

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(e) Petition to court for enforcement of order; proceedings; review of judgment.

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member,

agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court.

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Administrative Procedures Act, 5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393).

29 C.F.R. § 102.48(c):

Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

29 C.F.R. § 102.45(b):

Contents of record. The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative

Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in § 102.46, constitutes the record in the case.